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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
5

6 UNITED STATES OF AMERICA,

7
8 Plaintiff,

9 vs.

10 JUSTIN CURTIS WERLE,

11 Defendant.

)
) No. 2:14-CR-041-JLQ
)

) MEMORANDUM OPINION
) ON RESENTENCING
)
)
)

12
13 The resentencing hearing in this matter was held on August 5, 2016. Defendant
14 was present, in custody, and represented by Assistant Federal Defender Matthew
15 Campbell. The Government was represented by Assistant United States Attorney
16 Timothy Ohms. The court heard argument of counsel and heard from the Defendant. At
17 the conclusion of the hearing, the court announced the sentence. This Order
18 memorializes and supplements the oral findings and conclusions of the court.

19 **I. Introduction**

20 Defendant, Justin Curtis Werle (“Defendant”), was Indicted on March 4, 2014.
21 The Indictment (ECF No. 1) charged him in Count I with being a felon in possession of
22 a firearm in violation of 18 U.S.C. § 922(g)(1) and in Count II with possession of an
23 unregistered firearm in violation of 26 U.S.C. § 5861(d). Defendant litigated a Motion
24 to Suppress (ECF No. 35), and from the hearing, *inter alia*, the court is very familiar with
25 the facts and circumstances of this offense. After the court denied in part the Motion to
26 Suppress, Defendant entered a plea of guilty on June 26, 2014, pursuant to a Plea
27 Agreement, to both counts of the Indictment. The Presentence report calculated the

1 Defendant had at least three prior qualifying convictions under the Armed Career
2 Criminal Act (“ACCA”), 18 U.S.C. 924(e)(1) and was subject to a mandatory minimum
3 sentence of 15-years.

4 The court received briefing from the parties and made the determination Mr. Werle
5 was subject to the ACCA enhancement and the United States Sentencing Guideline range
6 was 188 to 235 months. At the September 5, 2014 sentencing, the Government argued
7 for a sentence of 199 months, and the Defendant argued for 73 months. The court
8 imposed a sentence of 180-months, and Defendant appealed. The Ninth Circuit Court of
9 Appeals affirmed the conviction, but vacated the sentence and remanded for resentencing.
10 The Court of Appeals stated: “We hold that the Washington riot statute does not qualify
11 as a violent felony for purposes of the ACCA sentencing enhancement.” The matter was
12 returned to this court for resentencing.

13 **II. Discussion**

14 The court has directed the United States Probation office prepare an Amended
15 Presentence Report (“PSR”) which did not contain the ACCA enhancement and allowed
16 the parties to file supplemental briefs and sentencing memoranda. (See Order at ECF No.
17 74). The PSR calculated a total offense level of 27, a criminal history category of VI, and
18 a Guideline Range of 130 to 162 months. Defendant objected to the PSR Guideline
19 calculation and contended his two prior convictions for harassment in violation of RCW
20 9A.46.020(b)(ii) were not “crimes of violence” under USSG § 2K2.1, which uses the
21 definition of “crime of violence” contained in USSG § 4B1.2. Defendant argued without
22 the enhancement the correct base offense level was 20, not 26, and the adjusted offense
23 level would be 21, with criminal history VI, and a Guideline range of 77 to 96 months.
24 (ECF No. 77, p. 1-2). Defendant requested a downward variance to a sentence of
25 between 51 and 63 months on the basis that the four-level enhancement for the firearm
26 having an obliterated serial number is unfair. (ECF No. 77, p. 9).

1 The Government argued the harassment convictions qualify as crimes of violence
2 and the correct Guideline range is as calculated in the PSR 130 to 162 months. The
3 Government contends the appropriate sentence is 146 months, which would require
4 running the sentences on Count I (felon in possession of firearm) and Count II
5 (possession of unregistered firearm) consecutively. Each count carries a 10-year
6 maximum sentence, and the sentences are not required to be run consecutively.

7 The Probation Officer determined the prior convictions qualify as crimes of
8 violence and answered the Defendant's objection in an Addendum to the PSR. The
9 Addendum (ECF No. 89) concludes the crime of harassment under RCW
10 9A46.020(2)(b)(ii) "includes, as an element, the knowing or threatened use of physical
11 force against the person of another." (ECF No. 89, p. 2). The amended PSR calculated
12 a total offense level of 27, criminal history VI, and the Guideline range of 130 to 162
13 months. The Probation Officer recommended the sentences on the two counts run
14 consecutively to reach a sentence within the Guideline range.

15 **A. Crime of Violence**

16 At the September 2014 sentencing, Defendant conceded the harassment charges
17 were violent felonies under the ACCA. (ECF No. 52, p. 2) ("Mr. Werle has only two
18 convictions for ACCA predicates."). Defendant now argues the convictions do not meet
19 the definition of "crime of violence" in the Guidelines. The definitions are substantively
20 the same, however there has been a significant intervening change in the law in *Johnson*
21 *v. United States*, 135 S.Ct. 2551 (2015), wherein the Supreme Court struck down the
22 "residual clause" of the ACCA. Neither the Supreme Court or the Ninth Circuit Court
23 of Appeals has yet determined that the *Johnson* analysis applies to the residual clause of
24 § 4B1.2. However, that issue need not be reached herein, as the court finds Defendant's
25 Washington harassment conviction qualifies under the elements/force clause of
26 4B1.2(a) ("has as an element the use, attempted use, or threatened use of physical force
27 against the person of another").

1 Defendant's convictions for harassment were under RCW 9A.46.020(2)(b)(ii),
2 which requires a knowing threat to cause bodily injury immediately or in the future to the
3 person threatened or to any other person by threatening to kill the person threatened or
4 any other person. The Guidelines definition of "crime of violence" is contained at
5 4B1.2(a) and provides:

6 (a) The term "crime of violence" means any offense under federal or state law,
7 punishable by imprisonment for a term exceeding one year, that --

8 (1) has an element the use, attempted use, or threatened use of physical force
9 against the person of another, or

10 (2) is burglary of a dwelling, arson, or extortion, involves use of explosives,
11 or otherwise involves conduct that presents a serious potential risk of physical injury to
12 another.¹

13 This court must first apply the "categorical approach" looking only to the fact of
14 conviction, the statutory definitions, and not to the particular facts underlying the offense.
15 *United States v. Werle*, 815 F.3d 614, 618 (9th Cir. 2016) citing *Taylor v. United States*,
16 495 U.S. 575 (1990). The court compares the elements of the prior conviction with the
17 generic offense. Defendant admits that Washington felony harassment has as an element:
18 "the defendant knowingly threatened to kill (name of person) immediately or in the
19 future". (ECF No. 77, p. 4). Werle's conviction for harassment, under subsection (b)(ii)
20 which contains a threat to kill, is a crime with an element the "threatened use of physical
21 force against the person of another", and therefore qualifies as a "crime of violence."

22 Defendant's arguments that the conviction does not qualify as a crime of violence
23 appear to be: 1) violation of the harassment statute does not require an intentional act; 2)
24 the level of force required does not rise to violent force; and 3) there is no immediacy

25
26 ¹USSG § 4B1.2(a) was amended effective August 1, 2016, but the amendment did not change
27 4B1.2(a)(1), which is the relevant provision here.

1 requirement.

2 **1. Intent** - The Washington felony harassment statute requires one “knowingly
3 threaten” and the specific subsection requires a threat to kill. Knowingly threatening to
4 kill requires intent. One does not recklessly or accidentally threaten to kill another. The
5 Ninth Circuit recently issued a decision in *United States v. Benally*, No. 14-10452
6 (August 1, 2016), wherein it stated: “a crime of violence requires a mental state higher
7 than recklessness—it requires intentional conduct.” (Slip Op. p. 10).

8 Defendant contended at oral argument the use of “knowingly threaten” makes
9 Washington harassment a general intent crime and such level of intent is not sufficient
10 for a crime of violence. The Ninth Circuit Court of Appeals rejected a very similar
11 argument in *United States v. Melchor-Meceno*, 620 F.3d 1180 (9th Cir. 2010). Therein
12 the Ninth Circuit found a conviction for felony menacing under Colorado law
13 categorically qualified as a crime of violence. The Colorado statute required a threat that
14 knowingly placed another in fear of imminent serious bodily injury. The Ninth Circuit
15 stated, “menacing is a general intent crime that requires the defendant to knowingly place
16 another person in fear ... Therefore, the predicate offense of menacing includes the
17 requisite *mens rea* of intent for a crime of violence.” *Id.* at 1186.

18 Very recently in *Arellano Hernandez v. Lynch*, No. 11-72286 (9th Cir. August 1,
19 2016), the Ninth Circuit found a conviction for criminal threats under California Penal
20 Code § 422 is categorically a crime of violence. Admittedly, the California statute and
21 Washington harassment statute contain different language, but the California statute does
22 include the following: “... even if there is no intent of actually carrying it [the threat]
23 out...”. (Slip Op. p. 6). The Washington Supreme Court has spoken to the meaning of
24 “knowingly threaten” in RCW 9A.46.020 in *State v. Kilburn*:

25 The statute requires that the defendant “knowingly threatens...”. This means that
26 “the defendant must subjectively know that he or she is communicating a threat,
27 and must know that the communication he or she imparts directly or indirectly is
28 a threat to cause bodily injury to the person threatened or to another person. Thus,

1 one who writes a threat in a personal diary or mutters a threat unaware that it might
2 be heard does not knowingly threaten.

3 151 Wash.2d 36, 48 (2004)(internal citations omitted).

4 This court finds the Washington harassment statute contains a sufficient mens rea
5 requirement (“knowingly threaten”) to qualify as a crime of violence. See also *United*
6 *States v. Palacios-Gomez*, __Fed.Appx.__; 2016 WL 1105296 (9th Cir. March 22,
7 2016)(“Knowledge is a sufficiently culpable mental state to qualify as crime of
8 violence.”)

9 **2. Physical Force** - Defendant argued the Supreme Court has defined “physical
10 force” as violent force, and the Washington harassment statute does not require violent
11 force. Defendant relied on *Johnson v. United States*, 559 U.S. 133, 138 (2010). In
12 *Johnson*, the Supreme Court was addressing whether a prior crime qualified as a “violent
13 felony” under the ACCA. The court found, in that context, “force” meant “violent
14 force—that is force capable of causing physical pain or injury to another person.” *Id.* at
15 140.

16 Sentencing Guideline 4B1.2(a) speaks of the “threatened use of physical force
17 against the person of another.” The subsection of the Washington harassment statute
18 under which Mr. Werle was convicted required that he knowingly threaten to kill another.
19 The force required to kill is certainly violent force - - force capable of causing physical
20 pain or injury. Defendant’s argument in the Reply (ECF No. 91) that a threat to kill is
21 not a crime of violence because even first degree murder is not a crime of violence is
22 rejected. Defendant argues one could be convicted under Washington’s first degree
23 murder statute for starting a fire that leads to the death of a firefighter. Although this
24 court need not definitively determine whether first degree murder is a crime of violence,
25 Defendant’s argument is unpersuasive. The argument that acts such as starting a fire, or
26 as made in other cases, poisoning a drink, do not involve violent force are unconvincing.
27 More convincing is the Supreme Court’s statement in *United States v. Castleman*, 134

1 S.Ct. 1405, 1415 (2014):

2 The ‘use of force’ in Castleman’s example is not the act of ‘sprinkling’ the poison;
3 it is the act of employing poison knowingly as a device to cause physical harm.
4 That the harm occurs indirectly, rather than directly (as with a kick or punch), does
5 not matter. Under Castleman’s logic, after all, one could say that pulling the
6 trigger on a gun is not a ‘use of force’ because it is the bullet, not the trigger, that
7 actually strikes the victim.

8 The instant inquiry is not difficult. A threat to kill is clearly a threat to use physical force.

9 As a final note on this matter, whether Washington felony harassment qualifies as
10 a violent felony under the ACCA has been previously addressed by the Ninth Circuit.
11 It was addressed in an opinion that was overruled on other grounds by the Supreme
12 Court. However, in *United States v. Descamps*, 466 Fed.Appx. 563, 565-66 (9th Cir.
13 2012), the Ninth Circuit set forth this rather straightforward analysis:

14 We also reject Descamps’s claim that his Washington state conviction for felony
15 harassment is not a violent felony. The amended information charged Descamps
16 with knowingly threatening to kill a judge in violation of the Revised Code of
17 Washington § 9A.46.020(1)(a). Descamps pled guilty. Descamps argues that a
18 threat to kill does not necessarily have as an element the threatened use of physical
19 force. We reject this argument. A finding that a person threatened to kill
20 necessarily requires a finding of “threatened use of physical force against the
21 person of another.”

22 This court recognizes that the *Descamps* panel opinion is not controlling authority,
23 however it is illustrative of a common-sense analysis.

24 **3. Immediacy** - Defendant also argued Washington felony harassment is
25 overbroad because it allows for the threat to be in the future. There is no immediacy
26 requirement in the plain language of § 4B1.2(a). It states: “has as an element the use,
27 attempted use, or threatened use of physical force against the person of another.”
28 Defendant cites no cases reading an imminent threat provision into the plain language.
Defendant stated at oral argument one could be convicted for Washington harassment
for making a threat to take action 30 years in the future. Defendant cites to no

1 Washington case law where individuals were convicted for making threats 30 years in the
2 future. In assessing whether the elements of a conviction are overbroad, the court need
3 not consider such hypotheticals. See *United States v. Fish*, 759 F.3d 1 (1st Cir. 2014)(“In
4 assessing whether the elements of the candidate proposed as a predicate crime are
5 overbroad, we need not consider fanciful, hypothetical scenarios.”); *United States v.*
6 *Maxwell*, 823 F.3d 1057 (7th Cir. May 24, 2016)(“[Defendant] cannot rely on fanciful
7 hypotheticals not applicable in real world contexts (apart from law school exams) to show
8 that the Minnesota statute is broader than the Sentencing Guidelines.”) citing *Gonzales*
9 *v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)(“To find that a state statute creates a crime
10 outside the generic definition of a listed crime in a federal statute requires more than the
11 application of legal imagination to a state statute’s language. It requires a realistic
12 probability, not a theoretical possibility, that the State would apply its statute to conduct
13 that falls outside the generic definition of a crime.”)

14 It may be that Defendant’s imminent argument is not intended as a stand alone
15 argument, but is part of his “physical force” argument—that the statute did not require
16 violent force because the threat could be in the future. In either regard, Defendant’s
17 argument fails. A “crime of violence” includes “threatened use of physical force” and
18 a threat necessarily implies future action. The definition of crime of violence does not
19 include that the threat be imminent or immediate. Defendant’s arguments as to
20 overbreadth are rejected. The court finds Defendant's conviction for Washington
21 harassment, under subsection (b)(ii) which contains a threat to kill, is a crime with an
22 element the "threatened use of physical force against the person of another", and therefore
23 qualifies as a "crime of violence."

24 **B. The 3553(a) Factors**

25 The court has concluded the Guideline calculation in the PSR is correct and adopts
26 the calculation: Offense Level is 27, Defendant’s criminal history is Category VI, and the
27 Guideline Range is 130 to 162 months. In its prior Sentencing Opinion (ECF No. 59, p.

1 5), this court set forth the nature and circumstances of the offense. Police responded to
2 a report from family members that Defendant was armed, may have discharged a firearm
3 in the house, and they were concerned about his mental state. Police officers encountered
4 Defendant in a convenience store with a sawed-off shotgun under his coat. The court
5 concluded:

6 The most important factors to the court, are the need for adequate deterrence and
7 the need to protect the public. As set forth in Defendant's Sentencing
8 Memorandum (ECF No. 56, p. 6), Defendant has been sentenced on 15 previous
9 occasions. Three of his prior sentences were for 1 year. Five of the sentences
10 were in the 3 to 5 month range. These prior sentences have not deterred Defendant
11 from further violent conduct. He was sentenced in August 2013 on the Riot
12 conviction where he shot someone with a firearm, and a mere four months later
13 was arrested on the instant offense. Defendant has engaged in a pattern of
14 assaultive conduct, some of it involving deadly weapons—knives and firearms. The
15 need to protect the public from further crimes of the Defendant is significant.
16 (ECF No. 59, p. 6).

17 Those considerations remain paramount. Even while incarcerated, Defendant's
18 failure to comply with the rules governing his behavior, and his assaultive conduct, have
19 continued. Defendant was sentenced in September 2014, and by February 2016, had
20 committed 7 infractions in Bureau of Prisons custody. Some of those infractions were
21 for apparently minor violations of BOP rules, while others involved illegal drug use and
22 assaultive conduct. (ECF No. 95, PSR at ¶¶ 149-155). Just days before his resentencing
23 hearing, on August 1, 2016, Werle was involved in an alleged assault on another inmate
24 at the Spokane County Jail.

25 The court, having considered all the 3553(a) factors, and considered the Guidelines
26 Range of 130 to 162 months, finds a 140-month sentence is sufficient but not greater than
27 necessary.

28 **C. Consecutive or Concurrent Sentences**

Defendant was convicted of two counts: 1) Felon in Possession of Firearm in
violation of 18 U.S.C. § 922(g)(1), and 2) Possession of an Unregistered Firearm in

1 violation of 26 U.S.C. § 5861(d). Each count carries a maximum sentence of 10 years.
2 Whether the sentences run consecutive or concurrent is, in this instance, within the
3 court's discretion under 18 U.S.C. § 3584. Section 3584(b) directs that the court consider
4 the 3553(a) factors as to each offense in determining whether the terms are to be ordered
5 to run consecutively or concurrently. As set forth *supra*, the court has thoroughly
6 considered the 3553(a) factors. In order to achieve a sentence within the Guideline range
7 and in accord with the court's determination that a sentence of 140 months is sufficient
8 but not greater than necessary in consideration of the 3553(a) factors, it is necessary that
9 the sentences run consecutively. The Government argued for a consecutive sentence, and
10 the United States Probation Office recommends a consecutive sentence.

11 Defendant stated at oral argument that running the sentences consecutively would
12 be unduly punitive and the sentences were not imposed consecutively at the 2014
13 sentencing. At the prior sentencing, it was the judgment of this court that Defendant was
14 subject to a 15-year mandatory minimum sentence under the ACCA on Count I, and a
15 maximum term of life. Therefore, no issue of concurrent versus consecutive sentencing
16 was argued to the court at the September 2014 sentencing.

17 **IT IS HEREBY ORDERED:**

18 Judgment shall be entered for a custodial term of 140-months, comprised of 120-
19 months on Count I, 20-months on Count II to be served consecutively, and a three-year
20 term of supervised release in accordance with this Order and the court's oral
21 pronouncement at sentencing.

22 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to
23 counsel.

24 Dated August 8, 2016.

25 s/ Justin L. Quackenbush
26 JUSTIN L. QUACKENBUSH
27 SENIOR UNITED STATES DISTRICT JUDGE